**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**WRIT PETITION NO. 628 OF 2007**

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| Nimish Thakore<br>Age : 47 years,<br>Indian Inhabitant, permanently<br>residing at 71, Pushpak Apts,<br>31, Altamount Road,<br>Mumbai - 400 026 | ] | Petitioner |
| Vs. | | |
| 1) Dhanraj Meghraj Rajpal<br>Indian Inhabitant, residing<br>at 32, Dwarka Corner,13/14th<br>Road, Khar (W),<br>Mumbai - 400 052. | ] | Respondents |
| 2) The State of Maharashtra<br>through the Public<br>Prosecutor, High Court<br>Bombay. | ] | |

Mr. Subhash Jha with Laxmi Menon and Ghanshyam Upadhyay i/b Law Glowbal for the Petitioner.

Smt. Priyanka J. Kanani for Respondent no.1.
Mr. Y.S. Shinde, APP for the State.

**CORAM : J.H. BHATIA, J.**
DATE : 25TH APRIL, 2007

**JUDGMENT**

1) Rule. Rule made returnable forthwith. With consent of the parties, petition is taken up for final hearing immediately.

2) The respondent no. 1 filed the complaint under Section 138 of the Negotiable Instruments Act against M/s Hetu Investment & Trading Pvt. Ltd. as accused no. 1 and six others as accused no. 2 to 7. The present petitioner was accused no. 2. The cheque was issued on behalf of the Company by the present petitioner. As per the contention of the complainant- respondent no. 1, for and on behalf of the accused no. 1 Company, the present petitioner had issued two cheques, one of Rs.2,75,000/- dt. 20th October, 1998 and another of Rs.10.42 Lacs dt. 11th December 1998. Both the cheques were presented for encashment but were dishonoured with remarks 'insufficient funds'. After statutory notice also, the accused persons failed to make the payment, hence the complainant filed the complaint.

3) It is not disputed that the cheques were signed by the present petitioner on behalf of the company and that he was also Director of the company and looking after its affairs. After hearing the parties, Special Metropolitan Magistrate, Mumbai by the judgment and order dt. 13th December 2006, convicted the accused no. 2 i.e. the present petitioner for the offence

punishable under Section 138 read with 142 of Negotiable Instruments Act and sentenced him to suffer S.I. for six months. Besides this, accused nos.1 and 2 both were also convicted for the offence under Section 138 read with 142 and were sentenced to pay fine of Rs.13,00,000/- each. In default, accused no.2 was to suffer S.I. for three months. The Court further directed that if fine amount is realized, sum of Rs.13,00,000/- be paid to the complainant by way of compensation under Section 357(1) of Cr.P.C., after the appeal period is over.

4) Being aggrieved by the conviction and the sentence, both the accused preferred Criminal Appeal No. 17 of 2007 before the Sessions Court, Greater Bombay. By order dtd. 12/01/2007, the learned Additional Sessions Judge admitted the appeal and directed to issue notice to the respondents. He also directed that substantive sentence shall stand suspended till next date in view of Section 357(2) of Cr.P.C. upon furnishing fresh bond by the appellant of the same bail amount. After service of notice to the complainant- respondent and after hearing both the sides, the learned Additional Sessions Judge, after referring to the judgment of this Court in **Dilip S.**

**Dahanukar & Anr. vs. Kotak Mahindra Co. Ltd. 2006(2) Bom. C.R. (Cri) 414**, directed the appellants to pay amount of Rs.13,00,000/- within a period of one month, while extending suspension of substantive sentence against the appellant no,. 1 (who was accused no. 2) and accordingly the substantive sentence against appellant no. 1 was suspended till disposal of the appeal subject to payment/deposit of the amount of Rs.13,00,000/- in the Court within a period of one month. This order is challenged by the original accused no. 2/ appellant no. 1 in the present petition. According to him, he was directed to pay amount of Rs.13,00,000/- within a period of one month as a condition for suspension of sentence of imprisonment which is tantamount to putting a condition of depositing the amount for admitting the appeal. According to him, if he fails to make the payment of such a huge amount within a period of one month, he will be required to go to Jail and thus his appeal will become infructuous and thus for all practical purposes he will be deprived of the right of appeal against conviction and sentence.

5) Heard Mr. Jha, learned Counsel for the petitioner and Ms. Kanani, leaned Counsel for

respondent no. 1. Mr. Jha pointed out that the judgment of learned Single Judge (Coram: D.B. Bhosale, J.) in **Dilip S. Dahanukar & anr. vs. Kotak Mahindra Co. Ltd. (supra)** was challenged before the Supreme Court and now the Supreme Court has modified the order by its judgment reported in **Dilip S. Dahanukar vs. Kotak Mahindra Co. Ltd. and anr., 2007 SCCL.COM.418**. I have carefully gone through the judgment of the Supreme Court. It may be pointed out that in that case, the company-accused no. 1 was convicted under Section 138 of the Negotiable Instruments Act and was sentenced to pay a fine of Rs.25,000/-. In default to pay fine by the company, its Chairman Dilip Dahanukar, who was accused no.2, was to undergo S.I. for one month. Accused no. 2 Dilip was also independently convicted under Section 138 read with 142 of Negotiable Instruments Act and was sentenced to undergo S.I. for one month. Besides this, the accused no. 2 was also directed to pay amount of Rs.15,00,000/- as compensation in two equal monthly instalments and in case of his failure to pay the compensation, he was directed to suffer further S.I. for two months. In that matter, the Supreme Court referred to Section 357 Cr.P.C. and pointed out that if the fine is the part of the sentence imposed under Section 357(1), the separate order

for payment of compensation cannot be passed under section 357(3) Cr.P.C. The Supreme Court observed that as far as appellant no. 1 in that case is concerned, no fine was imposed on him and he was directed to pay compensation. In view of the fact that the accused no. 2 in that case as the Managing Director of the Company was directed to pay compensation of Rs.15,00,000/- while no order was passed against the Company itself, their Lordships of the Supreme Court observed in para nos. 41 and 42, as follows :

> 41. The purpose of imposition of fine and/or grant of compensation to a great extent must be considered having the relevant factors therefor in mind. It may be compensating the person in one way or the other. The amount of compensation sought to be imposed, thus, must be reasonable and not arbitrary. Before issuing a direction to pay compensation, the capacity of accused to pay the same must be judged. A fortiori, an enquiry in this behalf even in a summary way may be necessary. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that whereas the power to impose fine is limited and direction to pay compensation can be made for one or the other factors enumerated out of the same; but sub-Section (3) of Section 357 does not impose any such limitation and thus, power thereunder should be exercised only in appropriate cases. Such a jurisdiction cannot be exercised at the whims and caprice of a judge.
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> 42. If a fine is to be imposed under the Act, the amount of which in the opinion of the Parliament would be more than

> sufficient to compensate the complaint, can it be said, that an unreasonable amount should be directed to be paid by the Court while exercising its power under sub-Section (3) of Section 357? The answer thereto must be rendered in the negative. Sub-Section (5) of Section 357 also provides for some guidelines. Ordinarily, it should be lesser than the amount which can be granted by a Civil Court upon appreciation of the evidence brought before it for losses which might have reasonably been suffered by the plaintiff. Jurisdiction of the Civil Court, in this behalf, for realization of the amount in question must also be borne in mind. A criminal case is not a substitution for a civil suit, far less execution of a decree which may be passed."

. From this, it is clear that a criminal case is not a substitution for civil suit or execution of a decree which may be passed.

6) In para 43, the Supreme Court observed that "prosecution under the Act may be contemplated as a measure of deterrence, but the same is never meant to be a persecution". After referring to the directions given by the Supreme Court in Stanny Felix Pinto vs. Jangid Builders Pvt. Ltd. and Anr. [(2001) 2 SCC 416], wherein the Supreme Court had opined that while entertaining revision applications, a part of the fine should be directed to be deposited, the Supreme Court observed that Section 389 does not deal with a similar situation. The Supreme Court held that appeal against the

conviction is a right provided by Section 374 Cr.P.C. and by virtue of the provisions of Article 21 of Constitution, the right of appeal against conviction is itself the fundamental right. Their Lordships observed as follows :

> "12. An appeal is indisputably a statutory right and an offender who has been convicted is entitled to avail the right of appeal which is provided for under Section 374 of the Code. Right of Appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of Article 21 is also a Fundamental Right. Right of Appeal, thus, can neither be interfered with or impaired, nor it can be subjected to any condition."

7) In para 72, their Lordships also observed that "an accused for commission of an offence under Section 138 of the Negotiable Instruments Act would ordinarily be granted bail, in view of the fact that the offence is a bailable one."

8) Their Lordships also observed in Para 75 and 76, as follows :

> 75. It is also of some significance to note that whereas under Section 357 (1) of the Code of Criminal Procedure a fine of Rs.5000/- can be imposed; fine in terms of Section 357(2) thereof can be twice the amount of cheque whereas there is no upper limit for award of a compensation. But the same would be subject to other provisions of the Code of Criminal Procedure which mandates that the amount of fine imposed on

an accused cannot be more than Rs.5000/-. The very fact that the Parliament did not think it fit to put a ceiling limit in regard to the amount of compensation leviable upon an accused, the discretionary jurisdiction thereto must be exercised judiciously. Ordinarily, an accused shall not be taken in custody during trial. Thus, while exercising the appellate power, ordinarily, a person should not suffer imprisonment only because the conditions imposed for suspending the sentence are harsh.

76. We are of the opinion that having regard to the aforementioned factors the amount of compensation not only must be reasonable one, the conditions for suspending the sentence should also be reasonable. It is only with that intent in view, the doctrine of purposive construction should be applied."

. After considering the legal position, their Lordships held in Para no. 79, as follows :

"79. We, therefore, are of the opinion:

i) In a case of this nature, Sub- Section (2) of Section 357 of the Code of Criminal Procedure would be attracted even when Appellant was directed to pay compensation;

ii) The Appellate Court, however, while suspending the sentence, was entitled to put the appellant on terms. However, no such term could be put as a condition precedent for entertaining the appeal which is a constitutional and statutory right;

iii) The amount of compensation must be a reasonable sum;

iv) The Court, while fixing such amount, must have regard to all relevant factors including the one referred to in Sub-Section (5) of 357 of the code of Criminal Procedure;

v) No unreasonable amount of

compensation can be directed to be paid."

9) From these observations, it is clear that while the compensation amount can be more than the fine which may be imposed under Section 357(1) read with 29 of Cr.P.C., ordinarily the accused shall not be taken into custody during trial and even pending the appeal he should not suffer imprisonment only because the conditions imposed for suspending the sentence are harsh. Therefore the amount of compensation should not only be reasonable but even the condition for suspending the sentence should also be reasonable. In view of above observations, it is further clear that even though accused may be directed to deposit compensation amount, normally Section 357(2) Cr.P.C. would be attracted and the payment of compensation amount to the complainant cannot be made till final hearing of appeal. While Appellate Court is entitled to put certain conditions for suspension of sentence, no such condition can be put as a condition precedent for entertainment of the appeal which is constitutional and statutory point.

10) In the present case, the present petitioner was convicted under Section 138 read with Section

142 (in fact it should be Section 141) of Negotiable Instruments Act and sentenced to undergo imprisonment for six months. However, surprisingly the accused no.. 1 Company and accused no. 2, the present petitioner were again convicted for the offence under Section 138 read with 142 and were sentenced to pay fine of Rs.13,00,000/- each and in default the accused no.. 2 is to undergo S.I. for three months.

11) According to Mr.Jha, learned Counsel, the second part of sentence is tantamount to the direction to pay compensation. Of course there is some ambiguity in the order passed by the learned Metropolitan Magistrate while convicting the accused persons and it needs to be addressed as and when the appeal preferred by the accused persons would be heard and decided.

12) After careful perusal of the order passed by the Appellate Court, it is clear that on the very first day i.e.12/01/2007 even before issuance of notice, the appeal was admitted and no condition was imposed as condition precedent for admission of the appeal. The substantive sentence of imprisonment was suspended till next date under Section 357(2) Cr.P.C. It appears that Section

357(2) was wrongly mentioned. In the order dtd. 7/3/2007, the learned Additional Sessions Judge directed the appellant to deposit payment of Rs.13,00,000/- within one month as a condition for suspension of substantive sentence. However, it appears that this order was itself passed in view of the decision of this court in **Dilip S. Dahanukar Vs. Kotak Mahindra & Co. Ltd. and Anr**. That judgment has been substantially modified by the Supreme Court as stated earlier. In the present case, admittedly the amount was due from the Company i.e. accused no. 1. Accused Nos. 2 to 7 were the Directors. However, it appears that accused no. 2 alone had issued the cheque and he was responsible for the business of the Company and therefore process was not issued to accused nos. 3 to 7. The present petitioner was convicted for the vicarious liability only because he was Director or Managing Director of the company and was responsible for carrying on the business of the Company. If he is directed to deposit the amount of Rs.13,00,000/-, as the condition for suspension of substantive sentence of imprisonment and if fails to deposit within one month as directed by the Appellate Court, there is strong possibility that he will be taken into custody and his appeal will not be decided before he undergoes the

substantive sentence of imprisonment. Thus for all practical purposes, he will be deprived of his right of appeal against conviction and sentence. Therefore, in my opinion, the condition to deposit of Rs.13,00,000/- is prohibitive and very harsh and needs to be modified.

13) Taking into consideration all the circumstances, I find that the present appellant may be directed to deposit the amount of Rs.2,00,000/- as a condition for suspension of substantive sentence of imprisonment within a reasonable time. Mr.Jha, learned Counsel for the Petitioner seeks 8 weeks time to deposit the amount.

14) In view of the above circumstances, the impugned order passed by the learned Additional Sessions Judge stands modified as follows :

i) The execution of substantive sentence of imprisonment awarded to the present petitioner/ accused no. 2 shall be suspended till the pendency of the appeal, subject to his depositing amount of Rs.2,00,000/-, out of the fine amount,

within a period of eight weeks from this day.

ii) After the amount is deposited, the respondent no. 1 / complainant would be entitled to withdraw the said amount. The deposit of the amount by the petitioner shall be without prejudice to the rights and contentions of the parties.

15) Rule made absolute accordingly.

**( J.H. BHATIA, J.)**